

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MOZILLA CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS
COMMISSION and UNITED STATES
OF AMERICA,

Respondents.

No. 18-1051 (Lead)

*Consolidated with Nos. 18-1052,
18-1053, 18-1054, 18-1055, 18-
1056, 18-1061, 18-1062, 18-
1064, 18-1065, 18-1066, 18-
1067, 18-1068, 18-1088, 18-
1089*

**THE ENTERTAINMENT SOFTWARE ASSOCIATION’S
MOTION FOR LEAVE TO INTERVENE IN SUPPORT OF PETITIONERS**

Pursuant to 28 U.S.C. § 2348, 47 U.S.C. § 402(e), and Federal Rule of Appellate Procedure 15(d), the Entertainment Software Association (ESA), a trade association representing companies that publish computer and video games for video game consoles, handheld devices, personal computers, and the internet, moves for leave to intervene as a matter of right in support of Petitioners in the above-captioned proceeding.

Petitioners seek review of a Federal Communications Commission (FCC) Order, which eliminates judicially approved rules the FCC adopted in 2015 to protect and promote net neutrality. *See Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, FCC 17-166, WC Docket No. 17-108 (rel. Jan. 4, 2018) (“Order”). Petitioners argue that the Order is “arbitrary, capricious,

and an abuse of discretion within the meaning of the Administrative Procedure Act, 5 U.S.C. § 701 et seq.,” “violates federal law, including ... the Communications Act of 1934, as amended, and FCC regulations promulgated thereunder,” “conflicts with the notice-and-comment rulemaking requirements of 5 U.S.C. § 553,” and is “otherwise not in accordance with law.”

ESA actively participated in the FCC proceeding, and because the FCC’s Order permits ISPs to take actions that could jeopardize the fast, reliable, and low-latency connections that are critical to the video game industry, ESA’s members’ interests will be substantially affected by this Court’s review of the Order. *See* Comments of the Entertainment Software Association, *Restoring Internet Freedom*, WC Docket No. 17-108 (filed Jul. 17, 2017). The FCC’s Order eliminates the rules that prevent broadband providers from blocking, throttling, and otherwise interfering with consumers’ access to content online. Absent these protections, ESA and its member companies will have no effective legal recourse against broadband provider conduct that impairs consumers’ online video game experiences. In particular, broadband providers are now permitted to engage in practices that degrade consumers’ traffic. That, in turn, could have significant consequences for the enjoyment of multiplayer online games and cloud-based game play services, both of which require low latency connections to support rapid and continuous interactivity. Unlike streamed movies or music, games cannot be

buffered to compensate for problems with the broadband connection. Degradation of consumers' traffic could also impact game distribution networks, which depend upon adequate and consistent bandwidth to deliver large file downloads in a timely manner. ESA therefore supports enforceable open internet protections that have helped fuel dynamic growth, competition, and innovation in the video game industry.

For the foregoing reasons, the Court should grant the Entertainment Software Association's motion to intervene.

Respectfully submitted,

/s/ Scott Blake Harris

Scott Blake Harris

E. Austin Bonner

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Dated: April 4, 2018

*Counsel for the Entertainment Software
Association*

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PROPOSED INTERVENOR'S CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Entertainment Software Association (ESA) hereby submits this Corporate Disclosure Statement. ESA is a trade association representing companies that publish computer and video games for video game consoles, handheld devices, personal computers, and the internet. ESA does not have any parent corporations and does not issue stock.

Respectfully submitted,

/s/ Scott Blake Harris

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PROPOSED INTERVENOR'S CERTIFICATE AS TO PARTIES

Pursuant to Circuit Rule 27(a)(4) and Circuit Rule 28(a)(1)(A), the Entertainment Software Association hereby certifies that in Case No. 18-1051 and the consolidated cases, the Petitioners are Mozilla Corporation; Vimeo, Inc; Public Knowledge; the Open Technology Institute; the State of New York, et al.; the County of Santa Clara, et al.; the California Public Utilities Commission; the National Hispanic Media Coalition; NTCH, Inc.; the Benton Foundation; Free Press; the Coalition for Internet Openness; Etsy, Inc.; Ad Hoc Telecom Users Committee; and the Center for Democracy and Technology. Respondents are the Federal Communications Commission (FCC) and the United States of America. The City of San Francisco has been admitted to the case as an Intervenor in support of Petitioners. The Entertainment Software Association seeks leave to appear in

this matter as an Intervenor in support of Petitioners. No *amici* have appeared before this Court.

Respectfully submitted,

/s/ Scott Blake Harris

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Dated: April 4, 2018

*Counsel for the Entertainment Software
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CERTIFICATE OF SERVICE

I certify that on April 4, 2018, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users. Users not registered with CM/ECF will be served by U.S. Mail.

CERTIFICATE OF COMPLIANCE

I certify that the forgoing Motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 414 words. This Motion complies with the typeface and type style requirements of Fed. R. App. P. 27 because this Motion has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

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